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IN THE

Supreme Court of the United States

HANS HEINRICH TITTUS,
Individually and as Agent for and on Behalf of
the Investors of Bluelake World, S.A.,

Petitioner,

v.

NATIONSBANK OF TEXAS, N.A.,
and NATIONSSECURITIES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a bank, which knows, or has constructive knowledge of felonious conduct engaged in by one of its customers, and which facilitates the transfer of money to that customer from a non-customer, owe a duty to the latter?

2. Has a bank, which deviated from its confirmed representation to accept money from a non-customer in a particular manner, in accordance with, and under the auspices of the Society for Worldwide InterBank Financial Transactions, breached a duty to that party?

PARTIES TO THE PROCEEDING

Petitioner is Hans Heinrich Tittus ("Petitioner" or "Tittus"), individually, and as agent for and on behalf of the investors of Bluelake World, S.A. ("Bluelake"). In addition to Tittus, a German citizen, the investors of Bluelake, who are Swiss, Austrian, or German citizens, respectively, are Arnold Gerhard, Josef Steiner, Arno Doll, Carlos Renz, and Gerhard Jansen.

Respondents are NationsBank, N.A. and NationsSecurities ("Respondents").

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Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") in this case.

OPINIONS BELOW

The orders of the Fifth Circuit are annexed hereto as part of the Appendix (App. 1a-2a), as is the Memorandum and Order of the United Stated District Court, Southern District of Texas (App. 3a-21a).

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit was entered on July 14, 2000. Thereafter, the Fifth Circuit entered an order on August 29, 2000, denying a timely filed petition for rehearing en banc, treated as a petition for panel rehearing (App. 20a-21a). The District Court had entered a Memorandum and Order, on August 10, 1999, granting Respondents' motion for summary judgment, from which the above-referenced appeal was taken.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. The Background Facts, Including the Actions of Respondents.

Sometime in March 1995, Petitioner, on behalf of Bluelake and its investors, decided to invest in a high-yield investment program circulating Europe (the "Program"). Bluelake was introduced to the Program by Topaz Liberty,

Inc. ("Topaz"), a company in Germany which allegedly administered Programs available to individuals, or groups with "pools" of money, capable of investing tranches in excess of Ten Million ($10,000,000) Dollars. The Program focused on the purchase and resale of bank debentures, which were to be traded two or three times per week at a substantial profit.[1]

On or about July 27, 1995, in order to participate in the Program, Tittus entered into a contract with Topaz. **R.92; Tittus Declaration ("T.Decl.")**.[2] As a result, Topaz provided Tittus access to a Trader (the "Trader"), identified as Treatment Services of the Southwest Corporation, Houston Texas ("Treatment") — allegedly capable of purchasing and reselling bank debentures. Topaz also identified the Trader's bank as NationsBank, N.A. (the "Bank").

In addition to the fact that the Trader had to be associated with a reputable bank, an extremely significant "feature" of the Program, operating as a safety net or "fail-safe" to protect the investor, was that the funds only were to be used to

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1. Many of these Programs actually are vehicles for what has become an internationally renowned "Ponzi" scheme, directed at naive investors, involving non-existent financial instruments known as "Prime Bank Guarantees, or PBGs". *Piedmont Resolution, L.L.C. v. Johnston, Rivlin & Foley*, 999 F. Supp. 34 (D.D.C. 1998).

2. All references **"R"** are to the Record in the district court; while **"RE"** refers to the Record Excerpts submitted to the Fifth Circuit. **Document #92** is comprised of the Declaration of Tittus, as well a number of other individuals referred to hereinafter, together with seven (7) deposition transcripts and selected, relevant documents obtained from non-parties. The Tittus Declaration is found in its entirety as part of the Appendix (App. 22a).

purchase Treasury Bills ("T-Bills"), to be *registered* in *Tittus'* name.* **R.92; T.Decl. pp.3-4.** It not only was important, but imperative to Tittus that he receive a *representation* by a reputable bank, doing business with the Trader (if you will, a partner), that the money would be accepted in this manner.[3] The first contact Tittus had with the Bank occurred on July *31*, 1995, when Tittus received the general wording for transmission of the money to be invested in the Program. As it turns out, Titus correctly assumed that the message he received was from the Trader, along with its Bank.

On July 31, 1995, a *Conditional* SWIFT, ZAT G31J2388, carrying the same information and verbiage Tittus had received from the Trader, was sent from Tittus' bank, Banca Della Svizzera Italiana, Zurich, Switzerland ("BSI"), to the Dallas wire room of the Bank. **R.92. RE.22-23.**[4] The SWIFT read, in pertinent part, as follows:

> RE CASH BACKED SWIFT WIRE TRANSFER **(CONDITIONAL)** WE, *BANCA DELLA SVIZZERA ITALIANA*, . . . HEREBY PRESENT

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* All emphasis hereinafter supplied.

3. It was understood by Tittus that the T-Bills which the Trader would purchase *from its bank*, were to serve as *collateral to secure a line of credit* necessary to participate in the Program, and which credit would be used to support the purchase and sale of the bank debentures. **R.1, Complaint, ¶17-21.** The T-Bills themselves *never* were to be traded, and no money was ever to be withdrawn.

4. **SWIFT** is an acronym for Society for Worldwide InterBank Financial Transactions; **SWIFTs** are administrative bank to bank messages administered by a company in Belgium, and governed by Belgian law, used to transfer funds internationally. All participants contractually agree to *abide* by SWIFT rules and regulations. The three pertinent SWIFTS are found in the Appendix (App. 42a).

> OUR IRREVOCABLE, TRANSFERABLE AND CALLABLE CASH BACK SWIFT . . . FOR THE ACCOUNT OF TREATMENT SERVICES OF THE SOTHWEST [sic] CORP, . . . IN THE AMOUNT OF TEN MILLION U.S.D. FOR PURCHASE OF U.S. TREASURY BILLS **AS HEREIN CONTAINED**.
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> * * *
>
> (2d Page) **TREASURY BILLS WILL BE** *ASSIGNED* **TO THE SENDER OF FUNDS. . . . TITTUS . . . FROM . . .** *DAY OF PURCHASE.*
>
> * * *
>
> THE ABOVE FUNDS WILL BE PAID TO YOU UNDER *EXPLICIT CONDITION* THAT YOUR BANK **CONFIRMS** TO US VIA KEY TESTED SWIFT **THAT YOU SHALL RETURN TO US THESE FUNDS IN FAVOUR OF THE INVESTOR** . . . TITTUS. UNENCUMBERED AND FREE OF LIENS **AT THE END OF ONE YEAR (1 YEAR)** AND PAYMENT [MADE] TO . . . TITTUS . . .

Tittus had been informed by *his banker* that when, and if, the Bank *accepted* his SWIFT, it would be *legally obligated to follow* its *verbiage*, and further would be *liable for purchasing T-Bills and registering* them in his name, as he requested. **R.92; T.Decl.**

At about the same time that it sent the SWIFT on July 31, 1995, BSI *faxed* and *mailed* a single page letter to the Bank, *inter alia*, inquiring of Treatment's "*rating*" as a Trader (*i.e.*, Treatment's ". . . standing and reliability . . .").

The inquiry requested information about whether Treatment genuinely was a ". . . [company] [that] we have been told is a *major operator* in *trading prime* papers, such as U.S. Treasury Bills, etc. . . ,"[5] and whether it maintained its "*trading account*" with The Bank. On August 1, 1995, the Bank *acknowledged* receipt of BSI's letter, but provided no information. As it turns out, Treatment had no "trading account" at the Bank. **RE-30-31.**

Tittus received *no immediate response* or acceptance from the Bank to the July 31, 1995 SWIFT — ZAT G31J2388. On August 2, 1995, however, Tittus sent SWIFT ZAT GO2A2389 *KORR*, which amended the July 31, 1995 SWIFT (ZAT G31J2388). **RE-24.**[6] On August 3 and 4, 1995, based on information provided to Tittus, through Topaz, Tittus sent two (2) additional SWIFTs to the Bank, ZAT GO3A2393 and ZAT GO4A2394. Each was intended to amend the first SWIFT, but the Bank never responded to either. **RE-27-28.**[7]

On or about August 7, 1995, Tittus, through his bank, BSI, *finally* received a key-tested SWIFT from the Bank

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5. As stated by one of Respondents' employees, these inquiries ultimately were to be forwarded to the manager of the branch where the customer (Treatment) banked. However, the Record is devoid of these inquiries being forwarded to anyone at the branch.

6. The August 2nd SWIFT ZAT G02A2389**KORR** corrected *only* the account number previously provided in the first SWIFT, deleting the first sentence under the caption, "Value Date", inserting new language in its place. **RE-24.**

7. Tittus did not know why these amendments were being requested, presuming it had something to do with the Trader and the Bank, again having obtained the information through Topaz.

which acknowledged reference to ZAT GO2A2389*KORR*. It directed Tittus, "*relating to transaction* . . . ZAT GO2A2389*KORR*, . . . [to] *transfer funds into* the account of *Treatment Services* of the Southwest . . . Account No. 2664065561 . . . Ten Million US Dollars *for Purchase of Treasuries*." **RE-26;27.**[8] The Bank *affirmatively acknowledged* receipt of and accepted **KORR** — the amendment to ZAT G31J2388, and instructed Tittus to ". . . transfer funds . . ." in accordance with *that SWIFT*.

Based upon the Bank's acceptance, Tittus understood that it would purchase T-Bills on his behalf, register them in his name, and deposit them in the Treatment account, *to be returned in a year*, per the conditions stated in his original SWIFT. Accordingly, Tittus directed BSI to transfer the monies, pursuant to the July 31, 1995 SWIFT, ZAT G31J2388, and the August 2, 1995 amendment, GO2A2389**KORR**. **RE-24.** His instructions to wire the $10M to the Bank were based *solely* upon the Bank's SWIFT, and his reliance thereupon — which called for the transfer in accordance with **KORR. T.Decl. pp.6-10.**

Despite sending its SWIFT to Tittus, advising him ". . . to transfer funds . . . for the purchase of treasuries", no T-Bills were purchased by anyone, and the $10M was deposited by the Bank into Treatment's account.

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8. That same day, Tittus' banker informed him that BSI had not received any response from the Bank in respect of the two subsequent amendments, also sent by SWIFT. **RE-34.** Tittus believed that once he sent the Bank his money, he had a contract based on the first SWIFT, the **KORR** amendment, and the Bank's key-tested SWIFT acceptance.

Between August 8, 1995, and approximately October 20, 1995, unbeknownst to Tittus, Frank W. Cross, Jr. ("Cross"), principal of Treatment, and L.E. ("Hamilton"), an associate, withdrew and converted Tittus' money. At the time these two felons provided declarations on behalf of Petitioner in this matter, both had been charged, convicted, and sentenced to jail for wire fraud. **RE-65.**[9] Cross and Hamilton had no reason to lie, and there was no reason not to consider their testimony.

Tittus and his banker understood that banks and individuals doing business with banks are entitled to rely upon SWIFTs. When the Bank sent its SWIFT in August, 1995, Tittus understood the Bank was sending its official administrative message to BSI, which represented that it was willing to, and would accept the $10M in accordance with his July 31, 1995 SWIFT, and would abide by its directives. He, therefore, understood that a contract had been formed, and that T-Bills would be purchased and registered in his name.[10] His frame of reference, *inter alia*, was information received from his banker at BSI, who held the same beliefs. **T.Decl.**

Notwithstanding the fact that the Bank argued in the district court that it owed Tittus no duty of care, on or about August 22, 1995, more than three weeks after the initial inquiry by BSI, its July 31, 1995 letter of inquiry was returned by the Bank, together with a form calling for, among other things, a 10-digit account number, and inquiring of the reason for BSI's query, *including the dollar amount involved.* Without letting even a

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9. Already sentenced, presumably neither had any reason to fabricate their involvement with Respondents. **R. 92.**

10. Petitioner's belief was that, once T-Bills were purchased and registered in his name, no one could do anything untoward with his investment.

day go by, on August 22, 1995, BSI faxed back to the Bank a second letter, together with a copy of its first letter, and a completed form (which had been sent to BSI), providing the information *requested* by the Bank. **RE-32-33; 31.** Copies of the three (3) page transmittal bear the Bank's "received" stamp, dated "August 23, 1995," as well as a "Credit Inquiry" stamp, affixed *the day after it was faxed.* **R.92; T.Decl.** The Bank's actions palpably belie its argument of no duty of care owed to Tittus.

B. The Bank Knew, or Had Reason to Know of Cross' Fraud.

At all relevant times, Treatment had a securities account at NationsSecurities ("NS"), *directly linked* to its account at the Bank.[11] Kevin Tyrrell ("Tyrrell") was Treatment's account executive. **Ex. "2" to Tyrrell ("Tyrr.") Dep.; RE-92.** It was established that in or around *mid-July* 1995, Jamie Atkinson ("Atkinson"), Tyrrell's supervisor, *summarily closed* Treatment's account due to suspicions of *fraud* and, with it, closed several other accounts which either had been opened on referral by Cross, or were about to be opened. At that time, Atkinson told Tyrell he was not to do business with any person related to either Treatment or Cross.

Over a period of a few weeks, between June *11* and July *28*, 1995, well *before* Tittus ever wired money to the Bank, Cross' actions were brought to the attention of John McKenna ("McKenna"), an officer of NS.[12] In conjunction with closing

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11. Monies could be transferred between them.

12. McKenna acknowledged that it was "*not normal to close an account, such as was done with Treatment*", i.e., it was an unusual occurrence. **R.92, McKenna ("Mck.") Dep. pp.19,20-22.**

Treatment's account, McKenna provided documents to June Thoreson-Rogers ("Rogers") of the Corporate Security Department ("Security") of NationsBank Holding Corporation ("Holding Corp."), the *parent* of both Respondents, identifying the targeted accounts, and the "common thread" to all of them (i.e, Cross)! Rogers testified that one of Security's primary functions was to engage in investigations *for and on behalf of all* subsidiaries, i.e., *Security operated as agent of each Defendant herein.*

In a memorandum, dated August *3*, 1995 ("Memo"), written one day before the Bank sent its SWIFT to BSI, *inter alia*, Rogers determined that, "[t]he common thread throughout [the] contacts [had] been an individual named Frank Cross, who [was] given credit for referring many of the new *customers* to Tyrrell", who, in turn, had obtained the Treatment referral *from the Bank*. **RE-36; T.92; Tyrr. Dep. pp.15-23; 60; 82.** Concerned that there were potential victims of a number of "fraud artists" at work, Rogers referred the matter locally to Security in Houston, *for further investigation*. **R.92; Rogers Dep. pp.15-17.**

The Respondents were aware of the *link* between the Treatment's accounts at NS and the Bank. **Exs. "1" and "2" to Mck. Dep., pp.51-56; Tyrr. Dep. pp.27-28.**[13] Moreover, according to NS personnel, including James Copeland ("Copeland"), a NS compliance officer, the purchase of T-Bills for, and on behalf of, *foreign clients*, in large denominations (i.e., millions), is the type of activity that *should raise* **"RED FLAGS"** to all concerned. According to this scenario, Cross' activities, therefore, were the classic

13. The declarations of Cross and Hamilton also conclusively show that Tyrrell knew what Cross was about to do to Tittus, and exactly how he was going to do it! **R.92.**

kind of scheme destined to result in fraud, based on the purchase of the *non-existent* "PBG's". **Copeland ("Cope.") Dep. pp.42-47; R.92.** *All* of this information either was *known*, or *constructively known* to the Bank through NS and Security.

Despite engaging in a purported "investigation" to determine ". . . who the potential victims [were, or might be] and who the fraud artists [were] in this menagerie of players", at least according to the testimony of Respondents' witnesses, *no one* saw fit to confer with the Bank and determine what Cross was doing, had been, or was about to do through his linked accounts. **RE-36.** A conundrum, since Ms. Rogers allegedly was concerned that one of the victims could be the Bank! **Rogers Dep. pp.35-36.**[14] In other words, Security was involved in this matter because the Bank must have considered that it had exposure. After all, Treatment's NS account already had been closed because of Cross' suspected felonious activity.

The Bank's branch manager, Terri Mustin ("Mustin"), admitted that no one on behalf of Security made *any* inquiries about Treatment's account until *after* the money had been stolen. **Mustin Dep. pp.63, 74.** Moreover, according to Tyrell, nobody from Security ever discussed with him Cross' activities, the individuals with whom Cross was doing business, or whether he knew that Cross was expecting to receive millions of dollars in wire transfers into Treatment's bank account. **Tyrr. Dep. pp.43-44.** Given Treatment's link between NS and the Bank, and the apparently recognizable **"RED FLAGS"** recognized by Mr. Copeland, Respondents had all the pertinent

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14. Rogers testified that she *would have been concerned* had she known Treatment had an account with the Bank because of the question of Cross' "legitimacy", i.e., what he was about. **Rogers Dep. p.48.** But, incredibly, Treatment *did* have an account at the Bank.

documentation and knowledge within their common possession to *foresee* the incredible danger posed to Tittus.[15] The foreseeability of this palpable danger to one who obviously expected his monies to be applied to the purchase of T-Bills, created a duty of care if one did not already exist.

C. Mustin's Negligence: Disregard for Her Supervisor's Directives.

Mustin was the recipient of the SWIFTs which, in turn, she relayed to her customer, Cross. Inexplicably, although a branch manger, she had no idea what a SWIFT was, or its purpose (an official bank to bank message used to create the relationship of the parties). **Must. Dep. pp.33-34; 100-102.** Upon receipt of the first SWIFT, Mustin queried her supervisor to determine what, if anything, was to be done about the **"CONDITIONAL"** SWIFT she had received, and the requirements that had to be met before the monies were wired.[16] Her supervisor's directive, according to Mustin, was

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15. In fact, in her Memo, Rogers specifically referred to an exchange between a NS executive named, Frank McCullen, and a Cross prospect, on August 2, 1995, in which the discussion focused on the introduction of ". . . *foreign clients* to NationsSecurities to buy U.S. Treasuries". On August 2, 1995, McKenna was aware of this incident. **Ex. "1", Cope. Dep.** A reading of the Copeland deposition reveals that Treatment's actions fit the prototype of a PBG scam.

16. Hyman Silkes ("Silkes"), Respondents' expert, testified that there is "*no such thing as a* **'Conditional SWIFT'** ", something that he would expect the Bank to know. **R.92; Silk. Dep. p.27; 45; 68.** Silkes testified that even he *did not understand* the language of the SWIFT. **Silk. Dep. pp.45-46; 56; 63-66.** A Conditional SWIFT, in and of itself, raises a **"Red Flag".** *Piedmont Resolution, L.L.C.*

(Cont'd)

to "*disregard*" the SWIFT, and Tittus, since the SWIFT was coming from an individual who was "not a customer of the Bank". **Must. Dep. p.96; 104-107; 120.**

SWIFT *standards*, by which participants such as the Bank must agree to abide, provide, *inter alia*, for the recipient to acknowledge the message (accepted or rejected). When accepted, the *recipient assumes responsibility* for the message. Moreover, a bank actually can make "queries" using various codes, including one for "potential rejection", and for "*fraud suspicion*". **RE-51-54.**[17] When, according to Mustin, *Cross* gave her the "*okay*", she affirmatively sent a SWIFT to Tittus, (BSI), instructing him, in accordance with, and in reference to ZAT GO2A2389*KORR*, to wire transfer the $10M for **"the purchase of Treasuries". Must. Dep. p.113.** Notwithstanding her supervisor's admonition to disregard the SWIFTs and Tittus, Mustin followed the felon's instructions (Cross).[18] The SWIFT from the Bank to Tittus carried no disclaimer![19]

(Cont'd)

v. Johnston, Rivlin & Foley, 999 F. Supp. 34 (D.D.C. 1998), a matter in which Silkes' expert testimony presented a complete contradiction to that given in the matter below, and which the district court apparently overlooked or disregarded.

17. Mustin did not reject Tittus' SWIFT.

18. Actually, this argument can be equally applied to the Bank's abject negligence, as well as its breach of contract; a bank officer, unacquainted with the legality and import of a *bank to bank instrument*, yet aware of the sender's concern about the safety of his money, allowing *her client* to draft the verbiage of an official bank, administrative message, advising Tittus, on behalf of her *Bank*, to wire the funds.

19. Mustin was aware that Tittus was *greatly concerned* about the safety and security of his money, and she perceived some confusion

(Cont'd)

D. Even a Disinterested Third-Party Bank Recognized Cross' and Treatments Fraud.

On or about October 5, 1995, two weeks *before* all of Tittus' money was purloined, Texas Commerce Bank ("TCB"), which possessed none of this Bank's extraordinary information or knowledge, without more, returned to the Bank, "*for the account of Treatment*", an attempted wire transfer of $8.5M. The money was returned based upon **"suspected money laundering". RE-45; Ex. "2", Silk. Dep 17-18.**[20] It is incredible to believe that this Bank, with the knowledge garnered and possessed by its agent, Security, which unquestionably outweighed the knowledge of TCB, did not apprize this German citizen, or his Swiss bank, that Petitioner was not a Bank depositor, or, at the very least, refuse to deposit Tittus' funds in Treatment's account.[21]

(Cont'd)
on his part (most assuredly she was totally confused), yet despite her espoused right to disregard Tittus, she induced him to wire the $10M. **Must. Dep. pp.116-117; 119; 120-121.** Despite Ms. Mustin's waffling testimony that "[her] understanding [was] that *Cross* was telling [Tittus] that the Bank would accept the money into his [Cross'] account", there is not a scintilla of evidence reflective of Cross' name on that SWIFT, or any SWIFT, or of Cross' participation, or that Tittus even was aware of Cross' existence at the time!

20. A chronology of events prepared by Respondents' counsel, **RE.45,** which indicates by entry of 10/05/95 (p. 2), that Treatment, for "reasons unknown", tried to wire $8,500,000 to TCB, *which rejected it.* At that point in time, $8.5 Million could have been salvaged.

21. Pursuant to SWIFT regulations, the Bank could reject the transfer, and, under these circumstances, had an obligation to do so.

REASONS FOR GRANTING THE WRIT

I. THE IMPACT OF THIS DECISION ON DEPOSITORS AND WOULD BE DEPOSITORS OF BANKS IS OF SUCH NATIONAL IMPORT THAT, RESPECTFULLY, THIS COURT MUST ADDRESS THE ISSUE.

A. The Integrity of the Banking Community Is In Question.

In the matter below, a foreign investor believed he was becoming a Ten Million ($10M) Dollar depositor of the Bank. He further believed that the SWIFT received from the Bank cemented the terms of a contract between the parties, with the Bank agreeing to accept his $10M, purchase of T-Bills, register them in his name, and see to it that the monies would be returned after one year. His reasonable understanding and belief was founded upon the Bank's acceptance of his SWIFT.

Instead, the Bank with actual or constructive knowledge that Tittus' money was going to be deposited into the account of a felon, neither rejected his SWIFT, nor disabused Petitioner of his understanding. The Bank's affiliate, NS, had expelled Cross because he was a "fraudster", and was aware of his involvement in these kinds of fraud. Yet, the Bank, with this imputed knowledge, did nothing to disabuse Tittus of his belief that he was a depositor, and, in fact, by its actions, misled him to believe that it was agreeing to the terms of his SWIFT. Despite the guidance provided to trial courts by this Court, *inter alia*, that issues of credibility are for the jury, the district court made a credibility finding as to the beliefs of this German citizen, and lawyer, whose only

frame of reference came from dealing with German and Swiss banks, in general, and from what he had been told by his Swiss banker, in particular, about the use and import of SWIFTs. The Petitioner clearly established that his belief and understanding could be deemed reasonable by a reasonable jury. *Lyttle v. Household Manufacturing, Inc.*, 494 U.S. 545, 554 (1990). The district court's finding that Petitioner's reliance was not reasonable or justified was a decision for the jury, not the trial court.

II. THE FIFTH CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT AND EFFECTIVELY ABROGATED THE STANDARD FOR GRANTING SUMMARY JUDGMENT.

A. The District Court's Decision Simply was Wrong.

The plethora of litigation in federal courts, coupled with the need for economy of effort and simplification of procedures, militates in favor of summary judgment — *where appropriate*. However, the need to reduce court congestion should not occur at the expense of the litigants, or the quality of justice expected of our judicial system, especially at the appellate level. And, it should not occur merely because a matter, though based on a extraordinary loss of Ten Million ($10M) Dollars, at first blush appears to be no more than a garden variety breach of contract/negligence case.

This Honorable Court recently reconfirmed its pronouncements concerning the standard to be applied in the context of summary judgment under Rule 56 of the Federal Rules of Civil Procedure; the Court should review all of the evidence in the record, draw all reasonable

inferences in favor of the non-movant, and the motion granted *only* if there is no legally sufficient evidentiary basis for a reasonable jury to find for the non-movant on that issue. *Reeves v. Sanderson Plumbing Prod.*, 530 U.S. __, 120 S. Ct. 2097, 147 L. Ed. 2d 105, 121-122 (2000), 68 USLW 4480; *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999).

Although ultimately resulting in the granting of motions for summary judgment, the decisions in *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), have provided to district courts a clear roadmap to analyze and evaluate motions, and by what they should be guided. *Inter alia*, those guidelines provide that the *movant* must demonstrate the absence of a genuine issue concerning any material fact. *Celotex v. Catrett*, at 232-35; *Cf.*, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 (1970). The movant also must identify those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, at 323.

However, it is *not* the trial court's function to weigh the evidence and determine the truth, rather merely to determine whether there is a genuine issue for trial. *Anderson*, at 249. To be "genuine" simply means that there is more than some metaphysical doubt. *Id.*, at 261. In viewing the evidence, the district court is constrained that the non-movant's evidence *is* to be believed, that *all* justifiable inferences must be drawn in its favor, and the motion denied, if reasonable minds can differ as to the import of the evidence. *Id.*, at 255; 250-251.

This Honorable Court never has vacillated from the pronouncements that credibility determinations, the weighing of evidence, and the drawing of inferences are *exclusively*

jury functions. *Lyttle, supra*, 494 U.S. 545, 554 (1990). The district court in the instant matter palpably disregarded those guidelines, and detoured from this Court's roadmap. Unfortunately, the Fifth Circuit chose to take the easier path, and failed to scrutinize the lower court decision.[22]

The district court's decision is in conflict, and cannot be reconciled with *Liberty Lobby* or *Celotex*, or their progeny. The trial court erroneously decided that there were no material issues of fact in dispute, reaching that conclusion by miscomprehending and misstating disputed facts, and improperly drawing inferences in favor of Respondents.[23]

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22. The Fifth Circuit recognizes the necessity of a fact-intensive review of the record below in order to determine the evidence and reasonable inferences therefrom. *Rubinstein v. Administrators of Tulane Educ. Fund*, 218 F.3d 392, 299 (5th Cir. 2000). It failed in this instance, although presumptively it has adopted the position that in cases where the record is small, the reviewing court must consider the entire record to determine if there is a genuine issue of material fact. *Nicholas Accoustics, Etc. v. H&M Const. Co., Inc.*, 695 F.2d 839 (5th Cir. 1983); *Keiser v. Coliseum Properties, Inc.*, 614 F.2d 406, 410-411 (5th Cir. 1980).

23. Among other misapprehended facts deduced by the district court, from which it, in turn, improperly drew inferences in favor of the movant, were that Petitioner intended for Cross to withdraw the funds — incorrect; that the Petitioner "hoped" the Bank would assist him, as opposed to his belief that he was becoming a Bank depositor; that it was to be *Cross* who would apply the funds in the manner Tittus requested, as opposed to Petitioner's expecting the Bank to purchase T-Bills as it had promised; and, that the Bank never promised Petitioner anything beyond accepting the funds into Treatment's account, as opposed to the Bank's advising Petitioner to wire the funds for the "purchase of Treasuries". Who did Terri Mustin expect would purchase the T-Bills? If it was Cross, how was she going to see to it that he honored the Bank's promise to make the purchase?

The Record below establishes peradventure that, although required by law, the movant never identified any portion of the Record which it believed demonstrated the absence of a genuine issue of material fact.[24]

B. The District Court's Decision Is in Conflict With Those of This Court.

What was in dispute, *inter alia*, was whether Petitioner's reliance on the Bank's SWIFT was reasonable and created an implied contract, and whether the foreseeability of the harmful consequences of depositing Petitioner's money into the account of a felon, actively engaged in fraud, triggered the existence of a duty. The fact that a foreseeable danger may result from intentional or even criminal misconduct is irrelevant, this Court has indicated that there is a duty to make a reasonable provision against it. *Harrison v. Missouri Pacific R. Co.*, 372 U.S. 248, 249 (1963); *Lillie v. Thompson*, 332 U.S. 459, 461-62 (1947). The district court's decision, affirmed by the Fifth Circuit, is in direct conflict with these decisions.

Given the knowledge of the Bank, as imputed from Security, and the foreseeability of Petitioner's money being stolen by this felon, especially in light of the Bank's directive to Petitioner to transfer the funds, the district court, and, in affirming, the Fifth Circuit, invaded the function and

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24. The record graphically illustrates that Respondents' "evidence" consisted of two flimsy affidavits. One by a "custodian of records" merely certifying records sent, or received by the Bank. The other, by Terri Mustin, merely stating that she received the SWIFTS in question, and transmitted one to Tittus' agent, BSI. Respondents essentially proffered *no evidence at all* as to the issues in dispute raised by Petitioner in opposition.

province of the jury by deciding that there was no duty owed by the Bank to Tittus. In the Fifth Circuit, *if* foreseeability requires a resolution of disputed facts or inferences, the questions are inappropriate to be resolved as a matter of law; it is a question of fact. *Washington v. Resolution Trust Corp.*, 68 F.3d 935, 938-940 (5th Cir. 1995), *citing*, *Kendrick v. Allright Parking*, 846 S.W.2d 453, 458 (Tex. App. 1992, *writ denied)*; *Cf.*, *Mosely v. Excel Corp.*, 109 F.3d 1006, 1008-1009 (5th Cir. 1997); *Doe v. Boys Clubs of Greater Dallas*, 907 S.W.2d 472, 477 (Tex. 1995).

The Bank's agent, Security, acquired knowledge of Cross' felonious activities as a result of the inquiry prompted by NS. A principal is bound by the knowledge its agent could have acquired through ordinary diligence when the agent is in possession of information sufficient to instigate an inquiry. *Askenase v. Fatjo*, 130 F.3d 657, 666 (5th Cir. 1997).[25]

Given the risk, foreseeability, and likelihood of injury application, in determining whether, from certain conduct viewed against the conduct's social utility and burden of guarding against the injury, the actor (here, the Bank, and all banks) owes a duty of reasonable care to the public at large (and, especially to one who, correctly or otherwise, believes himself to be a depositor doing business with the Bank).[26]

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25. Here, the agent already possessed the information, and actively was engaged in an inquiry. It would be incredible if Holding Corp. did not expect Security to apprize a subsidiary that it became aware of a problem such as this, even if Security had stumbled upon it.

26. Whether Petitioner was reasonable in believing himself to be a depositor was a jury question, not to be decided by a motion for summary judgment.

It would be a social injustice to allow banks to give away the public's money with impugnity to known, active, and awaiting felons. *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830, 834 (5th Cir. 1989); *Risenhoover v. England*, 936 F. Supp. 392, 407 (W.D. Tex. 1996).

In the most fundamental of ways, this kind of conduct by the Bank, if tolerated, will erode the public's confidence in the banking community in a country where our lawmakers steadfastly have enacted legislation bent on creating and instilling confidence in these institutions.

III. THE DECISION BELOW WILL HAVE A DEBILITATING EFFECT ON INTERNATIONAL BANKING TRANSACTIONS.

The district court palpably ignored the teachings of what appears to be the only reported case which squarely deals with the use of SWIFTs, and the fact pattern presented by this case, including the ". . . purchase of a non-existent . . . guarantee". *Piedmont Resolution, L.L.C. v. Johnston, Rivlin & Foley*, 999 F. Supp. 34, 39 (D.D.C. 1998).

The *Piedmont* Court held that the SWIFT created a contract for the transfer of funds, with the terms a question of fact *precluding summary judgment*. The Court in *Piedmont* further concluded that the bank, there, appeared to be negligent by even agreeing to accept a *conditional* SWIFT, something which all the experts who testified in that case agreed does not exist, and which raises **"RED FLAGS".**

Tittus' banker at BSI, Joseph Drescher ("Drescher"), believed that once the Bank sent its SWIFT, agreeing to the terms of the SWIFT of July 31, 1995, together with the

KORR amendment, Tittus was obligated to complete the contract by transferring his funds. Drescher imparted this information to Tittus, based on Drescher's international banking experience and understanding. Petitioner's justifiable reliance, therefore, was a question of fact.[27]

Whether correct in his assumption or not, under the circumstances, Tittus reliance appears to be reasonable and a question for the jury, not for the trial court, as to whether an implied contract had been established.[28]

In the instant matter, Mr. Silkes testified that there is no such thing as a conditional SWIFT. Whether the district court was compelled to follow *Piedmont* or not, it was the *only* case on point, and, in relation to the world of SWIFTS, provided a well-reasoned, detailed analysis of the law of contracts and negligence, as well as guidance vis-a-vis the use of this obviously, burgeoning international mode of funds transfer. *Piedmont's* applicability to the facts in the instant matter clearly militated against summary judgment.

Although the Bank, as a SWIFT member, contractually agreed to abide the SWIFT procedures, it totally disregarded them, allowing two employees who did not understand their use (e.g., Mustin) to engage in the transmission of these contractually engendering messages, thereby negligently inducing Tittus to transfer his funds.

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27. This material fact was never disputed by the Respondents. In fact, there were no reply pleadings, and nothing to assail the non-movant's evidence. Given the circumstances, it was not unreasonable for Petitioner to believe he had forged a contract. Mr. Silkes also conceded that *he knew* the Bank was advising BSI to transfer the funds *in accordance with* **KORR. Silk. Dep., p.69.**

28. The district court never even considered the legal ramifications of SWIFTs.

This Court has recognized the duty of care owed to one who is foreseeably in danger's path, and whose injury can be avoided by the proper conduct of an actor who is controlling the situation, and can take steps to avoid it. *Harrison v. Missouri Pacific R. Co.*, 372 U.S. 248, 249 (1963); *Lillie v. Thompson*, 332 U.S. 459, 461-62 (1947). Here, the Bank had to foresee the danger of depositing Petitioner's money into the felon's account. Instead of rejecting Petitioner's SWIFT, the Bank induced reliance in the Petitioner by making misrepresentations concerning its handling of the funds. In this regard, the Bank's actions, and the district court's decision, are in direct conflict with prior decisions of this Court.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED JULY 14, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

№ 99-20879

HANS HEINRICH TITTUS,
INDIVIDUALLY AND AS AGENT FOR AND ON BEHALF OF
THE INVESTORS OF BLUELAKE WORLD, S.A.,

Plaintiff-Appellant,

VERSUS

NATIONSBANK OF TEXAS, N.A.,
AND
NATIONSSECURITIES,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(H-97-CV-2687)

Before JOLLY, SMITH, and BARKSDALE, Circuit Judges.

Appendix A

PER CURIAM:*

We have reviewed the briefs and applicable portions of the record and have heard the arguments of counsel. We conclude that the district court was correct in entering summary judgment on all tort and contract claims asserted. The judgment, accordingly, is AFFIRMED.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED AND ENTERED AUGUST 10, 1999

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION H-97-2687

HANS HEINRICH TITTUS,

Plaintiff,

v.

NATIONSBANK OF TEXAS, NA, *et al.*,

Defendants.

MEMORANDUM AND ORDER

Plaintiff Hans Heinrich Tittus sued Defendants NationsBank of Texas, NA ("NationsBank") and NationsSecurities asserting causes of action for negligence, promissory estoppel, and breach of bailment and implied contract. The case is now before the Court on the Motions for Summary Judgment filed by NationsBank [Doc. # 94] and NationsSecurities [Doc. # 75],[1] to which Tittus has filed

1. Also pending is the Motion for Leave to Intervene filed by Robert B. Todd [Doc. # 98]. Todd alleges that he filed a related (Cont'd)

a Response [Doc. # 91]. Defendants obtained leave to file a reply, which they filed jointly on July 9, 1999 [Doc. # 100].

The Court has thoroughly reviewed the full record, including the arguments and evidence submitted by the parties. Based on this review, and the application of governing legal authorities, the Court **grants** both Motions for Summary Judgment.

I. FACTUAL BACKGROUND

Plaintiff represents a group of investors, known collectively as "Bluelake World, S.A." who sought to purchase $10,000,000 worth of United States Treasuries through Treatment Services of the Southwest Corp. ("Treatment Services"). On July 31, 1995, a Swiss bank ("BSI") sent a SWIFT[2] message to an officer of NationsBank. The July 31st SWIFT message provided in relevant part as follows:

(Cont'd)
lawsuit in 1996 and seeks through intervention in this case to assert a claim for attorney's fees for his work in the related case. Todd alleges that this cause of action is the only asset Tittus has in the United States. Because, as discussed herein, summary judgment in favor of Defendants is appropriate on Tittus's claims, Tittus is not entitled to any recovery from which Todd could seek to recover his attorney's fees. As a result, the Court **denies** Todd's Motion for Leave to Intervene.

2. SWIFT, which is an acronym for Society of Worldwide International Financial Transactions, is a mechanism for transmitting financial information between banks throughout the world.

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> We, [BSI], hereby present our irrevocable transferable, and callable cash back SWIFT wire in your favour, for the account of [Treatment Services], for the benefit of [Treatment Services], in the amount of ten million U.S.D. (USD 10'000'000.00) (sic) for the purchase of U.S. Treasury Bills as herein contained. . . . The deposit of the aforementioned funds will be in the account [Treatment Services] for the purchase of U.S. Treasury Bills. Treasury Bills will be assigned to the sender of funds, H.H. Tittus from the day of purchase. The above funds will be paid to you under the explicit condition that your bank confirms to us via key tested SWIFT that you shall return to us these funds in favour of the investor Mr. H.H. Tittus, unencumbered and free of liens, at the end of one year (1 year) and payment to the investor H.H. Tittus will be made without protest. . . .

July 31st SWIFT, Exh. 2.A to NationsBank's Motion. The July 31st SWIFT provided that it was valid for ten international banking days. *Id.* Tittus did not have an account or other previous relation with NationsBank.

On August 2, 1995, BSI transmitted an amendment to the July 31st SWIFT. The August 2 Amendment corrected the account number and changed the "value date" from "48 hours after your calling" to "same day value." August 2 Amendment, Exh. 2.B to NationsBank's Motion.

On August 3, 1995, BSI transmitted another amendment, referring to the July 31st SWIFT and the August 2

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Amendment. The August 3 Amendment contained the following material modifications to the July 31st SWIFT:

> Delete:
> Quote
> The above funds will be paid to you under the explicit condition that your bank confirms to us via key tested SWIFT that you shall return to us these funds in favour of the investor Mr. H.H. Tittus.
> Unquote.
>
> Insert:
> Quote
> The invested funds shall be returned by your bank to the investor Mr. H.H. Tittus . . .
> Unquote.
>
> Amend:
> Quote
> This SWIFT instrument is valid for ten international banking days and its conditions must be confirmed by your bank prior or at the time of your SWIFT transfer request.
> Unquote.

August 3 Amendment, Exh. 2.C to NationsBank's Motion.

On August 4, 1995, BSI transmitted yet another amendment, which referred to the August 3 Amendment and provided in relevant part as follows:

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Delete:
Quote
The invested funds shall be returned by your bank to the investor Mr. H.H. Tittus. . . .
Unquote

Insert:
Quote
The invested funds shall be returned to the investor H.H. Tittus . . . . . .
Unquote.

August 4 Amendment, Exh. 2.D to NationsBank's Motion.

Later during the day on August 4, 1995, Frank W. Cross, the principal of Treatment Services, directed NationsBank to send a SWIFT message to Tittus via BSI (the "SWIFT Acceptance"). The SWIFT Acceptance provided that "relating to transaction reference number [number of the August 2 Amendment], please be advised to transfer funds into account of Treatment Services of the Southwest [account number] amount of ten million US dollars for purchase of treasuries." SWIFT Acceptance, Exh. 2.E to NationsBank's Motion. The SWIFT Acceptance included no other terms.

BSI, on behalf of Tittus, FEDWIRE[3] transferred $9,999,985.00 (the "Funds") to Treatment Services' account at NationsBank on August 7, 1995.[4] The transfer stated "REC

3. FEDWIRE is the wire transfer system maintained by the Federal Reserve Banks of the United States.

4. The Funds amount represented the original $10,000,000 less a $15.00 transfer fee charged by BSI.

purchase of treasuries. Concerning our SWIFT re [July 31st SWIFT and August 2 Amendment]." FEDWIRE, Exh. 2.F to NationsBank's Motion. Tittus made no direct contact with NationsBank in depositing the Funds; all communication with NationsBank was from BSI. In accordance with the FEDWIRE, the Funds were deposited into the Treatment Services account on August 7, 1995. Statement, Exh. 2.G to NationsBank's Motion.

Cross withdrew the funds from the Treatment Services account and used them for unauthorized purposes. Cross was indicted in the United States District Court for the Northern District of Texas, Dallas Division, for conduct related to this transaction. On February 2, 1999, Cross entered a plea of guilty to one count of the indictment. Cross's appeal is currently pending before the Fifth Circuit.

II. SUMMARY JUDGMENT STANDARD

The United States Supreme Court has held that a motion for summary judgment is properly granted unless there is evidence "on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict . . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Wheeler v. Miller*, 168 F.3d 241, 247 (5th Cir. 1999). Rule 56 is an integral part of the Federal Rules of Civil Procedure, recognizing a party's right to demonstrate that certain claims have no factual or legal basis and to have those unsupported claims disposed of prior to trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

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Once the movant shows that there are no genuine issues of material fact, the burden is on the nonmovant to demonstrate with "significant probative evidence" that there is an issue of material fact warranting a trial. *Texas Manufactured Housing Ass'n v. Nederland*, 101 F.3d 1095, 1099 (5th Cir. 1996), *cert. denied*, 521 U.S. 1112 (1997). The nonmovant's burden cannot be satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a scintilla of evidence. *Doe v. Dallas Independent School Dist.*, 153 F.3d 211, 215 (5th Cir. 1998); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (*en banc*).

"Material that is inadmissible will not be considered on a motion for summary judgment because it would not establish a genuine issue of material fact if offered at trial and continuing the action would be useless." *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 192 (5th Cir. 1991). Rumors, speculation, hearsay and other information which would be excluded at trial cannot be considered in ruling on a motion for summary judgment *Fowler v. Smith*, 68 F.3d 124, 126 (5th Cir. 1995).

III. LEGAL ANALYSIS OF PLAINTIFF'S CLAIMS

A. *Negligence Claims*

1. Plaintiff's Allegations

Plaintiff in his first cause of action, entitled "Negligence and Negligent Misrepresentation" alleges that NationsBank should have known "from the totality of circumstances" that

Plaintiff wanted to protect his investment and that it was foreseeable that Treatment Services or Cross could dispose of Plaintiff's investment improperly. Complaint [Doc. # 1], p. 12. As a result, Plaintiff alleges, NationsBank had a duty "to either see to it that the Securities were purchased *and assigned*, as required by Tittus, or, in the alternative, to specifically inform Tittus, or his bank, BSI that the Bank did not feel it had an obligation to, nor would it require Treatment Services to invest the money as provided in the SWIFT." *Id.* (emphasis in original).

In his second cause of action, entitled "Negligence," Plaintiff alleges that NationsBank and NationsSecurities were aware that Cross "served as a common thread to the opening of several fraudulent accounts at NationsSecurities." *Id.* at 13. Plaintiff alleges that "given the totality of the circumstances," NationsBank and NationsSecurities "had a duty to further investigate the transactions between Tittus and Cross, and to forewarn Tittus that Cross and Treatment Services were possibly involved in fraudulent activity." *Id.* at 14.

In his third cause of action, also entitled "Negligence," Plaintiff alleges that NationsBank "did nothing to prevent the transfer by Cross of the remaining $8,000,000.00 in October of 1995," and that the "Bank and NationsSecurities were negligent in respect of said transfer." *Id.* at 14-15.

Plaintiff's fourth cause of action, entitled "Gross Negligence," is based on the same factual allegations as the negligence claims. Plaintiff alleges that Defendants' conduct "could only have resulted from a conscious indifference to the rights or welfare of the Plaintiff . . . ." *Id.* at 15.

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2. Analysis

Negligence Claims. — A cause of action for negligence exists only if the defendant owed a legally cognizable duty to the plaintiff. *Firestone Steel Products Co. v. Barajas*, 927 S.W.2d 608, 613 (Tex. 1996). The existence of a legal duty is a question of law for the Court. *Lefmark Management Co. v. Old*, 946 S.W.2d 52, 53 (Tex. 1997). Foreseeability alone is insufficient to create a legal duty. *See Golden Spread Council, Inc. v. Akins*, 926 S.W.2d 287, 290-91 (Tex. 1996).

As to each of his negligence-based claims against NationsBank, Plaintiff fails to present evidence which raises a fact question regarding NationsBank's duty to Plaintiff. The Texas Supreme Court has held clearly in a strikingly similar case that the "bank owed no duty to [the non-customer depositors] to police the . . . account to inquire as to whether [the account holder] owed them a fiduciary obligation and, if he did, whether he applied the funds as he was obligated to do." *Citizens National Bank of Dallas v. Hill*, 505 S.W.2d 246, 249 (Tex. 1974).

Plaintiff argues that the wire transfer deposit of the Funds into the Treatment Services account was a special deposit because the transfer instructions stated that the Funds were for the "purchase of treasuries." Plaintiff bears the burden to prove that NationsBank was his trustee or owed him "a duty to restrict the use of the funds for certain purposes" and that NationsBank agreed to accept that obligation. *Id.* at 248. "If the agreement of the bank is to be implied by its acceptance of the deposit with the limitation stated on the

deposit slip, the writing should set forth by clear direction what the bank is required to do." *Id.*

Plaintiff's "special deposit" argument, when presented by the plaintiffs in *Citizens National Bank*, was rejected by the Texas Supreme Court. In *Citizens National Bank*, the plaintiffs (Hill and Lawson) transmitted funds to *Citizens National Bank* for deposit into an account owned by Wayne Cook Associates, Inc. *Citizens National Bank*, 505 S.W.2d at 247. Hill and Lawson intended for the money to be used for a loan to a company, but Cook withdrew the money from the account and used it for other purposes. Hill and Lawson sued the bank to recover the funds. The Texas Supreme Court held that the bank had no liability to Hill and Lawson, reversing the appeals court's decision that the deposit by Hill and Lawson was a special deposit which the bank was required to restrict solely for the loan. *Id.* The Texas Supreme Court noted that "Hill and Lawson had no accounts or previous relations with Citizens National Bank. They made no direct contact with that bank in placing the disputed funds there but instructed their banks . . . to wire credit instructions through other Dallas banks." *Citizens National Bank*, 505 S.W.2d at 247. The credit instructions indicated that the deposits were for "Skidmore Crook loan." The Texas Supreme Court held that the wording of the credit instructions did not direct the bank to control the disposition of the funds. *Id.* at 249. Concluding that the deposits were not "special deposits," the Supreme Court held that the bank owed no duty to Hill and Lawson to police the account to ensure that Cook applied the funds as he said he would. *Id.*

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Plaintiff presents no legal or factual basis for his argument that NationsBank owed him a duty to ensure that Cross would apply the Funds in the manner Tittus requested, to investigate Cross, or to warn Tittus that Cross might be engaging in fraudulent activity. Absent evidence from which a legal duty would arise, NationsBank is entitled to summary judgment on the negligence-based claims.

Negligence Claims Against NationsSecurities. — Plaintiff's negligence claims against NationsSecurities are, at best, without merit. Plaintiff alleges that NationsSecurities obtained information that Cross was "a common thread" in fraudulent schemes involving accounts at NationsSecurities and, as a result, closed several accounts controlled by Cross.[5] Based on this allegation, Plaintiff argues that NationsSecurities, a sister corporation of NationsBank, had a duty to protect Plaintiff's deposit of the Funds into the Treatment Services' account at NationsBank. Plaintiff presents no legal or factual support for this novel argument.

It is undisputed that NationsSecurities did not deal with Tittus or BSI in connection with the wire transfer. It is undisputed that NationsSecurities did not receive any of the Funds from the wire transfer. It is undisputed that Tittus was not an account holder with NationsSecurities. NationsSecurities owed no duty to protect Plaintiff's Funds

5. Plaintiff's attempt to impute NationsSecurities' knowledge to NationsBank is without merit. NationsSecurities and NationsBank are separate corporations. Plaintiff presents no legal support for his argument that information discovered by an agent of the parent corporation while performing an investigation for NationsSecurities, is imputed as a matter of law to a sister corporation.

in the Treatment Services account at NationsBank. NationsSecurities is entitled to summary judgment on Plaintiff's negligence claims.

Negligent Misrepresentation Claim. — "The elements of a cause of action for negligent misrepresentation are: (1) the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest; (2) the defendant supplies 'false information' for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation." *Allied Vista, Inc. v. Holt*, 987 S.W.2d 138, 141 (Tex. App. – Houston [14th Dist.] 1999, review denied) (citing *Federal Land Bank Ass'n v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991)). To satisfy the "false information" element, "the misstatement must be of *existing fact*, not a promise of future conduct." *Allied Vista*, 987 S.W.2d at 141.

Plaintiff fails to identify information communicated to him other than the SWIFTs described above. Plaintiff's desire to protect his investment and his hope that NationsBank would assist in achieving this goal do not establish a misstatement of existing fact. Plaintiff does not identify any statements made to him by NationsSecurities. Defendants are entitled to summary judgment on Plaintiff's negligent misrepresentation claim.

Gross Negligence Claim. — A cause of action for gross negligence requires the existence of negligence.

See Shell Oil Co. v. Humphrey, 880 S.W.2d 170, 174 (Tex. App. – Houston [14th Dist.] 1994, writ denied). Having concluded that Plaintiff's negligence claims fail as a matter of law, the Court grants summary judgment in favor of Defendants on Plaintiff's gross negligence claim.

B. *Promissory Estoppel*

Plaintiff alleges that NationsBank "led Tittus to believe that it would accept the monies in question, and see to it that a purchase of Treasuries would be made, and deposited in the account of Treatment Services, but assigned to H.H. Tittus, as he had requested, . . ." Complaint, at 16. Based on this allegation, Plaintiff argues that NationsBank should be estopped to deny liability in connection with the wire transfer.

"The elements of promissory estoppel are a promise, foreseeability by the promisor that the promisee would rely on the promise, and substantial reliance by the promisee to his detriment." *Allied Vista*, 987 S.W.2d at 141 (citing *English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983)). "Promissory estoppel does not operate to create liability where it does not otherwise exist." *Id.* (citing *Hruska v. First State Bank of Deanville*, 747 S.W.2d 783, 785 (Tex. 1988)). Promissory "estoppel requires a *reasonable* or *justified* reliance on the conduct or statement of the person sought to be estopped by the person seeking the benefits of the doctrine." *Id.* (citing *Simpson v. MBank Dallas, N.A.*, 724 S.W.2d 102, 108 (Tex. App. – Dallas 1987, writ ref'd n.r.e.) (emphasis in original)).

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Plaintiff fails to present evidence which raises a genuine issue of material fact regarding his claim that NationsBank promised him anything beyond accepting the Funds for deposit into the Treatment Services account. Indeed, there is no evidence of direct contact between Plaintiff and NationsBank, and the SWIFTs do not support Plaintiff's allegation regarding a promise by NationsBank to protect Plaintiff's investment. Additionally, Plaintiff's evidence fails to raise a fact dispute regarding the reasonableness of his alleged reliance on the conflicting SWIFTs to protect his $10,000,000 investment.

Plaintiff's evidence does not support his promissory estoppel claim, and Defendants are entitled to summary judgment on this cause of action.

C. *Breach of Bailment and Implied Contract*

For his final cause of action, Plaintiff alleges that NationsBank "agreed to accept Tittus' money and to see to it that there would be a resulting purchase of Securities, assigned to Tittus." Complaint, at 17. Plaintiff alleges that NationsBank "became a bailee of the monies transferred by Tittus and became obligated to return the bailment to Tittus upon demand." *Id.* at 18.

"The basic elements of bailment are: (1) the delivery of personal property by one person to another in trust for a specific purpose; (2) acceptance of such delivery; (3) an express or implied contract that the trust will be carried out; and (4) an understanding under the terms of the contract that the property will be returned to the transferor or dealt with

as the transferor directs." *Soto v. Sea-Road International, Inc.*, 942 S.W.2d 67, 72 (Tex. App. – Corpus Christi 1997, writ denied).

Plaintiff alleges that there existed an implied contract for a bailment. "A bailment contract may arise by implication of law if through the proof of sufficient circumstances the implied relationship of bailor and bailee is shown to rest upon substantive foundation." *Id.* An implied contract arises from the conduct of the parties, such conduct demonstrating that the minds of the parties met on the terms of the contract without any legally expressed agreement thereto." *Williford Energy Co. v. Submergible Cable Services, Inc.*, 895 S.W.2d 379, 384 (Tex. App. – Amarillo 1994, no writ). The parties must express "their intentions in a manner that is capable of understanding." *Id.*

Plaintiff's evidence fails to raise a genuine issue of material fact to support his bailment and implied contract theories. Although Plaintiff intended for the Funds to be used for a special purpose when withdrawn by Cross, the Funds deposited in Treatment Services' account at NationsBank were "so far as the depositary bank was concerned, a general deposit . . . and the title to the money passed from the depositor to the bank, which became debtor to the [account holder] in a like amount." *Linz v. Eastland County*, 39 S.W.2d 599, 603 (Tex. Com. 1931); *see also Citizens National Bank*, 505 S.W.2d at 249 (any trust indicated by the deposit of funds into the account of a third-party would involve the account holder as the trustee, not the bank).

Appendix B

The exchange of SWIFTs, many amending prior amendments, does not present evidence which raises a genuine issue of material fact to support Plaintiff's claim that an implied contract existed for NationsBank to ensure that Cross used the Funds to purchase United States Treasuries for Plaintiff, or for NationsBank to return the Funds to Plaintiff at any point. NationsBank is entitled to summary judgment on the breach of bailment and implied contract claim.

IV. CONCLUSION AND ORDER

Plaintiff has failed to present evidence which establishes a genuine issue of material fact to support his argument that Defendants owed a duty to Plaintiff which they breached. Plaintiff has similarly failed to present evidence to support his promissory estoppel and breach of bailment and implied contract claims. Because Plaintiff has not presented a factual or legal basis for his claims, Defendants are entitled to summary judgment. It is hereby

ORDERED that Defendants' Motions for Summary Judgment [Doc. # 75 and Doc. # 94] are **GRANTED.**

It is further **ORDERED** that Robert B. Todd's Motion for Leave to Intervene [Doc. # 98] is **DENIED.**

On or before **August 23, 1999**, counsel for Defendants shall advise the Court in writing regarding the current status of Defendants' Third-Party claims, and counsel for any Third-Party Defendant with a pending cross-claim or other

claim shall advise the Court in writing of the current status of the pending claim(s).

SIGNED at Houston, Texas, this 10th day of August, 1999.

s/ Nancy F. Atlas
NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

APPENDIX C — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED AUGUST 29, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20879

HANS HEINRICH TITTUS, Individually, and as Agent for and on behalf of the Investors of Bluelake World, SA

Plaintiff – Appellant,

v.

NATIONSBANK OF TEXAS, N A;
NATIONSSECURITIES,

Defendants – Appellees.

Appeals from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC
(Opinion 7/14/00, 5 Cir., __, __ F.3d __)

Before JOLLY, SMITH, and BARKSDALE, Circuit Judges.

Appendix C

PER CURIAM:*

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

* * *

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
United States Circuit Judge

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* Judge Higginbotham did not participate in this matter and is recused.

APPENDIX D — DECLARATION OF HANS-HEINRICH TITTUS DATED MAY 20, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. H-97-2687

HANS-HEINRICH TITTUS, Individually, and as Agent for and on behalf of the Investors of Bluelake World, S.A.,

vs.

NATIONSBANK OF TEXAS, N.A.
and NATIONSSECURITIES,

vs.

FRANK W. CROSS, KATHY P. CROSS, LEE ELLIOTT HAMILTON, BRIAN FACKRELL, TREATMENT SERVICES OF THE SOUTHWEST, CORP. D/B/A EARTHQUEST ACADEMY, CHANGES AND CHOICES, BOTTOM LINE ASSOCIATES, BARCLAY'S BANK, PLC., ELNORA DESTIN CONLEY, HARRISON HOUSE LIMITED, ROBERT A. KNAPICK, MARK C. HAMILTON, CHARLES P. JACKSON, BONNIE COPPEDGE, MICHELLE R. FOUNTAINE, AND DONALD L. MORTON

DECLARATION OF HANS-HEINRICH TITTUS

I, HANS-HEINRICH TITTUS, pursuant to 28 U.S.C. 1746, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct:

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1. I am an attorney at law, and I reside in Ulm, Germany.

2. Sometime in or around March 1995, Bluelake World, S.A. ("Bluelake"), originally a "shelf corporation", was purchased by, and on behalf of a number of investors (the "Investors"), of which I am included, to invest in a high-yield investment program (the "Program"). The Investors became Bluelake's shareholders.

3. We were introduced to the relevant Program in question by a Dr. Andreas Sigmund ("Sigmund"), who was a financial agent in Wiesbaden, Germany, and who, in turn, introduced us to Dr. Hartmut Kellhofer ("Kellhofer"), who allegedly managed a Program involving the purchase and resale of bank debentures, which were to be traded two or three times per week, at a substantial profit.

4. Dr. Kellhofer, as I learned, was the principal of Topaz Liberty, Inc. ("Topaz"), which was the manager of this funds management Program, similar to ones the Investors had understood were available either to individuals or to "pools" capable of investing Ten Million ($10,000,000) Dollars, or more.

5. On or about July 27, 1995, with the approval, acquiescence, and direction of my fellow Investors, I entered into a funds management contract with Topaz Liberty (the "Contract").

6. Topaz Liberty, as funds manager, provided us access to a Trader (the "Trader"), allegedly capable of the purchase and resale of bank debentures. At or around the time I executed the Topaz Liberty Contract, Dr. Kellhofer

identified the Trader to me as Treatment Services of the Southwest Corporation ("Treatment"); Kellhofer also identified the Trader's bank as NationsBank, N.A. of Texas (hereinafter the "Bank" or "NationsBank").[1]

7. At the time I executed the Topaz Liberty Contract, I also provided Dr. Kellhofer with a Power of Attorney, according to him, necessary in the event that Topaz Liberty needed to appoint any agents.

8. In turn, as I discovered some time very much later, Topaz Liberty executed a Power of Attorney in favor of Andromeda International, Ltd. ("Andromeda"), operated by one Alexander Davidoff ("Davidoff"); Andromeda apparently was retained as agent to Topaz Liberty, although I did not know this at any relevant point in time.

9. Previously, on or about July 6, 1995, on behalf of the Investors of Bluelake, and in anticipation of having money available to invest, I deposited to an account opened in my name at Banca Svizzera Della Italiana, Zurich, Switzerland, ("BSI"), a check in the amount of $10,181,078.72, the approximate amount the "pool" intended to invest in a Program.

10. A feature of the Topaz Liberty Program, which was extremely significant, and which made the Program appealing, was that the funds were to be used to purchase Treasury Bills ("Treasuries"), designed to be *registered* in *my name*.*

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1. I did not learn at this time, or at any relevant point in time, who owned or operated Treatment.

* Emphasis supplied.

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11. It was not only extremely important, but necessary, that we receive a representation by a reputable bank associated with the Trader that the Treasuries would be bought, and registered in my name.[2]

12. The first contact I had with NationsBank occurred on July 31, 1995.

13. Immediately prior to that date, I received from Dr. Kellhofer, through Dr. Sigmund, the general wording for the ultimate transmittal by SWIFT, by my bank (BSI), of the money intended to be invested in the Program.

14. Since Kellhofer was dealing with the Trader, and the Trader, in turn, with NationsBank, I assumed the wording I received to be directed by the Trader and/or its Bank, although I did not know for sure.

15. SWIFT, as I understand it, is an acronym for Society for Worldwide International Financial Transactions; SWIFT is administered by a company in Belgium, and governed by Belgian law.

16. After receiving this verbiage, which comported to our understanding of how the Treasuries would be purchased *and registered*, I took it to the office of Mr. Benno Hafner, Esq., our attorney at the time, whose secretary typed the SWIFT wording we wanted.

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2. The Treasuries were to serve as collateral, or margin, to secure a line of credit necessary to participate in the Program, which the Trader would obtain from its bank. See Complaint, paragraphs 17-21.

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17. Mr. Hafner, in turn, either took the SWIFT to Joseph Drescher, ("Drescher"), the banker with whom I, on behalf of Bluelake's Investors, was doing business with at BSI, or faxed it to him.

18. Mr. Drescher is a Senior Vice President of BSI, as I understand it, and has been engaged in the commercial and private banking business since 1956. He is the Director of the Zurich branch of BSI, and has held that position for approximately the last six (6) years.

19. In or around July, 1995, Mr. Hafner, who is a local Zurich attorney, had introduced me to Mr. Drescher as a prospective customer of BSI.

20. In fact, on behalf of my co-Investors, I became a BSI customer as a result of that introduction, and, on or about July 6, 1995, I delivered a Trinkhaus & Burkhardt bank check representing the "pool" money, $10,187,078.72, into the account opened at BSI in my name; No. 94371.

21. In response to Mr. Drescher's requests of me, necessitated by his obligation to comply with BSI's requirement of due diligence in opening an account with such a large deposit, we provided to him resumes of all the investors, and also that of Mr. Hafner, who was operating on my behalf under a Power of Attorney; we also provided Mr. Drescher, as required by BSI, with what is commonly referred to as Form "A", a document which identifies all beneficial owners of any account held at Swiss banks.

22. The information contained therein identified the beneficial owners of the account, in addition to me, to be,

and who remain: Arnold Gerhard, Josef Steiner, Arno Doll, Carlos Renz, and Gerhard Jansen.[3]

23. Mr. Gerhard is Swiss; Mr. Steiner, Austrian; and, the remainder of us are German.

24. On July 31, 1995, the SWIFT, in turn, was sent from the wire transfer room of BSI in Lugano, Switzerland, to NationsBank in Dallas, Texas.

25. That SWIFT, ZAT G31J2388, was sent to NationsBank based on the information provided to BSI by me, which I received from Dr. Sigmund. Annexed hereto as **Exhibit "A"** is a copy of the SWIFT in question.

26. Prior to sending the SWIFT, Mr. Hafner and I had called the legal department of SKA Bank in Lucerne, Switzerland ("SKA"), to inquire of the consequence of utilizing SWIFTs to send either messages or money.

27. We were informed that NationsBank would have to follow our wording, and would be liable for purchasing Treasuries and registering them in my name, as we would be requesting.

28. My understanding from conversations with personnel at SKA, BSI, and other banks, therefore, was that a receiving bank had to accept the conditions of a SWIFT

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3. I am not sure if Joachim Krielke's resume was included, but he was bought out by the other Investors and, at the time the BSI account was opened that buy-out may already have been in its early stages and, therefore, not provided.

since SWIFTs are bank to bank messages sent between banks participating in the SWIFT program.

29. Mr. Drescher also informed me that a bank officer, on behalf of his client, would have an obligation to transfer money when another bank sent a SWIFT to that effect.

30. To my understanding, a SWIFT is actually a bank to bank payment order and/or administrative message. As such, I would expect any responsible bank to either follow the directives of a SWIFT containing stipulations, or to indicate to the sender Bank that it was either not going to follow some of the directives or stipulations, or not going to accept the message at all.

31. To my knowledge, BSI received no response from NationsBank to SWIFT ZAT G31J2388, sent on July 31, 1995.

32. From conversations with Mr. Drescher, I have determined that, on July 31, 1995, as I later found out, Mr. Drescher also *mailed* and *faxed* a single page letter to NationsBank, which mailed letter bore his telephone and telefax numbers, inquiring of the Bank, among other things, the *rating* of Treatment Services, the Trader to which we were going to be engaging in the trading business (*i.e.*, inquiring of Treatment's ". . . standing and reliability . . ."). The inquiry, among other things, requested information about whether Treatment maintained its "trading account" with NationsBank.

33. On August 1, 1995, the Bank *acknowledged* receipt of Mr. Drescher's letter. Annexed hereto as **Exhibit "B"**

and Exhibit "B1", respectfully, is a copy of that letter, as mailed, and as faxed.[4]

34. On August 2, 1995, based on information again provided by me, BSI sent SWIFT ZAT GO2A2389***KORR***, which was intended to amend the SWIFT of July 31, 1995 (ZAT G31J2388), correcting *only* the account number previously provided in the first SWIFT, and deleting the first sentence under the caption "Value Date", inserting new language in its place. Annexed hereto as **Exhibit "C"** is a copy of the second SWIFT.

35. On or about August 22, 1995, as I understand it, Mr. Drescher's letter of July 31, 1995 actually was returned by NationsBank, together with a form requiring, among other things, a 10-digit account number, and requesting the reason for BSI's inquiry, *including the dollar amount involved.*

36. On August 22, 1995, Mr. Drescher faxed back to the Bank a second letter of the same date, together with his first letter and the form sent to him by the Bank; only at this point it contained the information requested on that form. Annexed hereto as **Exhibit "D", "D1", and "D2"**, respectfully, are copies of that three (3) page transmittal, which bears the Bank stamp dated "August 23, 1995", i.e., *as received.*

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4. Recently, our counsel received certain documents from Mr. Drescher, who will testify at the trial of this matter, which included correspondence sent on behalf of BSI's client. Mr. Drescher, as I understand it, however, could not release official bank documents like Form "A", and I know of no way to compel BSI to do that, since Swiss bank secrecy laws are very restrictive as to the dissemination of official bank documents.

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37. In the interim, on August 3 and 4, 1995, based on information provided to me by Dr. Sigmund from Dr. Kellhofer, BSI sent two (2) additional SWIFTs to NationsBank, ZAT GO3A2393 and ZAT GO4A2394, respectively; each of these SWIFTs, as I understand it, and as indicated on their face, were intended to request amendments to the previous SWIFT of July 31st but, to my knowledge, these were SWIFTs to which the Bank also never responded.[5] Annexed hereto as **Exhibit "E"** and **"F"**, respectively, are the SWIFTs in question.

38. On or about August 7, 1995, received through BSI's head office in Lugano, was a SWIFT from NationsBank to BSI, by which NationsBank *finally* acknowledged reference to SWIFT ZAT GO2A2389**KORR**, and advised BSI, "relating to transaction . . . ZAT GO2A2389***KORR***, . . . *to transfer funds into* the account of *Treatment Services* of the Southwest . . . Account No. 2664065561 . . . Ten Million US Dollars *For Purchase of Treasuries*." Annexed hereto as **Exhibit "G", and "G1"**, respectfully, are copies of the NationsBank SWIFT.

39. On the same day, Mr. Drescher wrote to me informing me, in essence, that BSI had received this SWIFT from NationsBank, which had acknowledged only the SWIFT sent on August 2, 1995, which bears the designation ZAT GO2A2389**KORR**, and advised me that the Bank had not made any response in respect of the two subsequent

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5. I did not know why these amendments were being made, but presumed it had something to do with the Trader and the Bank, since I obtained the information from Dr. Kellhofer, via Dr. Sigmund.

amendments sent by SWIFT. Annexed hereto as **Exhibit "H" and "H1"**, respectfully, are copies of Mr. Drescher's letter to me, and its enclosure, which BSI also recently released to our attorneys; a copy evidently was also sent at this time to my attorney, Mr. Hafner, together with the NationsBank SWIFT, although I did not retain a copy.[6]

40. In other words, NationsBank acknowledged receipt of SWIFT ZAT GO2A2389**KORR**, *only*, the first amendment to SWIFT ZAT G31J2388, the two page transmittal of July 31, 1998, and instructed us to transfer funds in accordance with that SWIFT, which amended the SWIFT of July 31, 1995.

41. This message was especially gratifying since NationsBank apparently was accepting the funds based on our initial directive, pursuant to the SWIFT of July 31, 1995, together with the minor amendment contained in **KORR**; and, either the Bank or the Trader had changed its position with regard to the two additional amendments, the wording of which I had received from Sigmund.

42. As I understood it, NationsBank now was responding to my directive to purchase Treasuries on my behalf, register them in my name, and deposit them in the Treatment account.

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6. The word "Zurigo", at the top of the SWIFT, is the Italian translation for Zurich, and indicates to me that the Lugano office in that part of Switzerland, which is Italian, sent the SWIFT to the BSI branch in Zurich (i.e., "Zurigo"), after its initial receipt.

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43. Since the Treasuries would be registered in my name, no one could transfer them without my participation, and they would be returned to me at the end of the year, as I further requested in the SWIFT.

44. While the second and third amendments had changed the terms to some extent, NationsBank apparently now was accepting the wire transfer pursuant to the original terms, and the minor amendment.

45. On August 7, 1995, therefore, I faxed a letter to Mr. Drescher, a copy of which is annexed hereto as **Exhibit "I"**, in which I instructed BSI to now transfer the funds pursuant to the two SWIFTs referenced therein, ZAT G31J2388, the two page SWIFT message sent on July 31, 1995, *and*, ZAT GO2A2389**KORR**, the first amendment.

46. My instructions to Mr. Drescher to wire the $10 Million was based solely on the receipt of, and reliance upon the NationsBank SWIFT, which called for the transfer in accordance with **KORR**.

47. **KORR** only amended the SWIFT of July 31, 1995 in one minor detail. Conversely, the SWIFT of July 31, 1995 directed NationsBank to purchase Treasuries, register them in my name, and return them in one year *to me*.

48. My letter to Mr. Drescher clearly reflects my state of mind, as I referenced only the two SWIFTs which NationsBank also referenced: ZAT GO2A2389**KORR** and ZAT G31J2388.

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49. BSI followed my instructions, and on or about August 7, 1995, in turn, through its United States correspondent, wire transferred $10,000,000 (US) to NationsBank Account No. 2664065561; the account of Treatment Services.

50. As pointed out in the Motions for Summary Judgment by NationsBank and NationsSecurities (hereinafter "NationsSecurities"), and as I learned many months thereafter, Frank W. Cross, Jr. (hereinafter "Cross"), the owner and principal of Treatment Services, through a series of transfers, withdrew and dissipated approximately Two Million ($2,000,000) Dollars of the Ten Million ($10,000,000) Dollars in question, the remaining Eight Million ($8,000,000) Dollars ultimately went through the Bahamas, and $7.5 Million is the subject of a forfeiture action in the State of Arizona.

51. I was unaware of the existence of Frank Cross at the time, and unaware of the unauthorized use of the Investors' money.

52. My understanding always had been that the Treasuries were to be purchased and used to secure a line of credit for the purchase of bank debentures which would be traded several times a week, garnering substantial profits.

53. Since, to my knowledge, the Trader's bank was going to be involved in the process, I felt very secure that the Investors finally had gotten into a suitable and substantial Program.

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54. There did come a time in the fall of 1995 when, not having received the expected profits on our investment, I authorized the transfer of the *line of credit* believing, apparently erroneously, that my Treasuries remained at NationsBank.

55. I later learned that Eight Million ($8,000,000) Dollars in cash was transferred from the account at NationsBank.

56. At that time, Mr. Cross and/or Elnora Destin Conley ("Conley"), his lawyer, and others, including one, Elury Liday Hamilton (hereinafter a/k/a "Lee Elliott Hamilton"), had been involved in transferring the remaining Eight Million ($8,000,000) Dollars in cash to the Bahamas.

57. As pointed out in the Complaint, the Administrators who entered into the agreement between Treatment on one hand, and Topaz Liberty and Andromeda on the other, were entitled *only* to pledge the Treasuries. They could be pledged ". . . in exchange for a line of credit which [was to] be utilized for the purposes of the purchase and subsequent sale of medium term senior . . . obligations from the top one hundred (100) world prime banks . . .", with a certain additional proviso, *inter alia*, as to the investment grades of those obligations.

58. As stated in my Complaint, between the time the funds were wire transferred to NationsBank on or about August 7, 1995, and the time that approximately Eight Million ($8,000,000) Dollars were transferred to the custody and control of others in or around October 1995, Treatment

Services, Cross, and Hamilton caused Two Million ($2,000,000) Dollars to either be wired, or sent by check, to various and sundry individuals with whom they either had business relationships, or to others with whom they had personal relationships, either of a family nature, or of a social nature.

59. After it became apparent to us in late 1995, and/or early 1996, that the Investors' monies possibly could be lost, we determined to contact NationsBank and to learn what had transpired.

60. In December of 1995, I began a litany of letters (four (4) in number) to NationsBank, copies of which are annexed hereto as **Exhibit "J", "J1", "J2", and "J3"**, respectfully, to which *no one* responded, *inter alia*, instructing NationsBank to transfer the Treasuries, and revoking the Power of Attorney in favor of Dr. Kellhofer, all in an effort to recover securities which I had assumed were still at the Bank.[7]

61. All my letters reference ZAT GO2A2389**KORR**.

62. Since the SWIFTs in question had been bank to bank messages, I thought, perhaps, that transmittals from BSI might better operate to get some response from this Bank.

63. Therefore, on or about January 12, 1996, Mr. Drescher was sent a facsimile from Mr. Hafner, at my request,

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7. I also called Terri Mustin ("Mustin"), the manager of the NationsBank branch in Pasadena, Texas, in December, but she refused to provid me with any information.

which requested that Mr. Drescher contact NationsBank, by SWIFT, to make certain inquiries in respect of the $10,000,000 transfer which had been made in August of 1995.

64. On January 15, 1996, Mr. Drescher sent by SWIFT the message provided to him by Mr. Hafner and, in turn, Mr. Drescher sent to Mr. Hafner an acknowledgment of the same. Annexed hereto as **Exhibit "K", "K1", and "K2"**, respectfully, are those transmittals.

65. On January 22, 1996, Mr. Drescher sent to NationsBank a second request denominated as ". . . very, very urgent", a copy of which is annexed hereto as **Exhibit "L"**, together with a cover letter to Mr. Hafner, **Exhibit "L1"**, repeating Mr. Drescher's earlier request.

66. To this day, from my conversations with Mr. Drescher, I can say that he has never received an answer to either of the last two requests made of NationsBank in January of 1996.

67. In my experience as a German attorney, from my somewhat conversant knowledge of Swiss law, and from conversations with Swiss bankers, as I understand it, banks and their customers are entitled to rely upon SWIFTs and telex messages from other reputable banks, since a SWIFT is an administrative bank to bank message, used to communicate messages to each other, as well as to be used in connection with the wire transfer of monies from one bank to another.

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68. When NationsBank sent its SWIFT to BSI in August, 1995, I assumed that NationsBank was sending to BSI an official administrative message by which it represented that it was willing to, and would accept the $10,000,000 in question in accordance with **KORR**, which amended the July 31, 1995 SWIFT ever so slightly and inconsequentially, and in accordance with that original SWIFT, would abide by the directives.

69. Mr. Drescher also told me that he felt that BSI, as a party to SWIFT, was obligated on behalf of its client to comply with the NationsBank's SWIFT.

70. As I have learned from my attorney, as a result of discovery, including depositions recently taken in the United States, Treatment Services had a trading account at NationsSecurities *linked* to its bank account at NationsBank.

71. In or around mid-July 1995, Jamie Atkinson (hereinafter "Atkinson"), the branch manager of the Houston, Texas branch of NationsSecurities, closed down Treatment's account and, with it, several other accounts either opened upon referral by Frank Cross, or about to be opened based on referrals by Frank Cross.

72. In conjunction with closing down Treatment's account at NationsSecurities, the Compliance Manager of NationsSecurities, John McKenna (hereinafter "McKenna"), provided documents to Ms. June Thoreson-Rogers ("Rogers"), who worked for the Corporate Security Department (East) of NationsBank Holding Corporation, identifying these fraudulent accounts, and the common threads to all of them,

Frank Cross, and his account executive at NationsSecurities, Kevin Tyrrell ("Tyrrell").

73. As I have been told by my attorney, and from reviewing Ms. Rogers' deposition, it appears that Corporate Security engaged in investigations for and on behalf of all of the subsidiaries of NationsBank Holding Corporation, including NationsBank of Texas, and NationsSecurities.

74. Ms. Rogers, through information provided to her by Mr. McKenna, determined, among other things, that, "[t]he common thread throughout [the] contacts [had] been an individual named Frank Cross, who [was] given credit for referring many of the new *customers* to Tyrrell".

75. Kevin Tyrrell was the account executive of Treatment Services at NationsSecurities, and had obtained the Treatment Services referral from NationsBank.

76. Ms. Rogers apparently was concerned that there were potential victims of a number of fraud artists at work and, therefore, referred the matter to Corporate Security (West) in Houston, Texas for investigation.

77. Apparently, from the deposition testimony of Ms. Rogers, Mr. McKenna, James Copeland (hereinafter "Copeland"), a former employee of NationsSecurities Compliance Department, and the declarations of Frank Cross and Elliott Hamilton, being submitted contemporaneously herewith, NationsSecurities and NationsBank were aware of the link between the NationsSecurities account of Treatment which was closed down in July 1995, and the NationsBank account of Treatment Services in the Pasadena, Texas, branch

of which the daughter of Frank Cross also was employed at the time.

78. As I understand it, Treatment's account at the Bank remained "open" for years after this incident, despite that the Defendants were aware of Cross' actions.

79. According to the deposition of James Copeland, the purchase of U.S. Treasuries for and on behalf of foreign clients in large denominations (e.g., millions) was the type of activity to raise **"RED FLAGS"**, and that his experience in compliance, and working for other broker-dealers, dictated to him that the activity by Treatment Services and Frank Cross was the kind that was aimed to engage in fraud, including in the purchase of prime bank guarantees, something which Copeland knew *do not exist*.

80. Unfortunately, the Investors of Bluelake were not nearly as sophisticated as the employees of NationsSecurities, and we were unaware that prime bank guarantees did not exist until after this litigation began.

81. As I have noted from the deposition of John McKenna, he also is aware that prime bank guarantees do not exist, from his experience, and from various and sundry industry reports, including those to which brokers would be privy, in addition to everyday news releases like the Wall Street Journal, and other news publications.

82. Presumably, so would Kevin Tyrrell!

83. As I understand it from the deposition of Terri Mustin, the manager of the branch in Pasadena, Texas, at

which Treatment Services did its banking, no one on behalf of Corporate Security (West), including Tasi Bailey, Wayne Geddes ("Geddes"), or any other security personnel made *any* inquiries of her about Treatment Services' bank account until after the Investors' money had been dissipated by Treatment Services.[8]

84. It was only in late 1995, or perhaps early 1996, that Ms. Mustin was approached by Raymond Jackson of Corporate Security (West), and by that time the money of the Investors of Bluelake was gone.

85. According to Mr. Tyrrell's deposition, no one from Corporate Security (East or West) ever even discussed with him what kind of business Frank Cross was engaged in, whether Tyrrell knew that foreign clients were wiring millions of dollars into the bank account of Treatment Services, etc.

86. Tyrrell only had some passing reference made to him by Mr. Geddes about "looking into Frank Cross", but well after the fact.

87. Given the relationship between NationsSecurities and NationsBank in respect of Treatment Services, and the **"RED FLAGS"** apparently recognizable by NationsSecurities personnel who provided the information to Corporate Security investigating this matter on behalf of those corporate entities, no one saw fit to inquire of the Bank

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8. These individuals were on the referral list from Ms. Rogers, and Ms. Mustin did not even know who they were.

personnel as to what Treatment Services was doing in connection with its banking account.

88. As is apparent from the declarations of Frank Cross and Elliott Hamilton, as well as the deposition testimony of Mr. Copeland and Mr. McKenna, NationsSecurities was on notice that Frank Cross, and those to whom he was connected, were engaged in activity that would lead to prime bank guarantee fraud, and certainly, according to my attorneys, NationsBank, at the very least, because of its relationship to NationsSecurities, and the joint investigative activities of Corporate Security, was on constructive notice to the same fraud, if not a unwitting participant because of is negligence.

89. This declaration is being submitted in opposition only to those facts raised by the Motions for Summary Judgment made by NationsSecurities and NationsBank, and not intended to encompass all the facts of which I am aware in connection to this matter.

90. It is respectfully submitted that the Defendants' Motions for Summary Judgment be denied.

91. If called upon to testify at the trial of this matter, I would aver to the same facts as I have stated herein under oath.

Dated: Ulm, Germany
May 20, 1999

s/ Hans-Henrich Tittus
HANS-HEINRICH TITTUS

APPENDIX E — JULY 31, 1995 SWIFT FROM TITTUS TO NATIONSBANK

95JUL31 17:27:37 Local Terminal PZH1
MT 6199 Free Format Page 00001
Func ZAPRIN

Basic Header	F 01 BSILCH22A80A 0000 000000
Application Header	I 199 NABKUS44XDAL N
	*NATIONSBANK OF TEXAS, N.A.
	*DALLAS,TX
	*(TEXAS HEAD OFFICE)
User Header	Bank. Priority 113:
	Msg User Ref. 108:
TRN	*20 : ZATG31J2388

Narrative *79 : TO NATIONS BANK OF TEXAS, N.A.
BANK OFF. MS. TERRI MUSTIN.
BANK. CENTER MANAGER
ACCOUNT NUMBER 254065561
ACCOUNT HOLDER: TREATMENT SERVICES OF THE SOUTHWEST. CORP.
TRANSACTION CODE 79510
FROM BANCA DELLA SVIZZERA ITALIANA, ZURICH
BANK OFFICER: MR. J. DRESCHER
ACCOUNT HOLDER: H.H. TITTUS
ACCOUNT NUMBER 94371 JOJO
FAX NUMBER 0041 1 2058368
SWIFFT CODE BSILCH2280A

RE CASH BACKED SWIFT WIRE TRANSFER (CONDITIONAL)

Appendix E

WE, BANCA DELLA SVIZZERA ITALIANA, BLEICHERWEG 37, 8022 ZUERICH, SWITZERLAND, HEREBY PRESENT OUR IRREVOCABLE, TRANSFER AND CALLABLE CASH BACK SWIFT WIRE IN YOUR FAVOUR, FOR THE ACCOUNT OF TREATMENT SERVICES OF THE SOUTHWEST CORP. FOR THE BENEFIT OF TREATMENT SERVICES OF THE SOUTHWEST CORP. IN THE AMOUNT OF TEN MILLION U.S.D. (USD 10'000'000.00) FOR THE PURCHASE OF U.S. TREASURY BILLS AS HEREIN CONTAINED.

VALUE DATE: 48 HOURS AFTER YOUR CALLING THE FUNDS. WE HEREWITH CONFIRM THAT THE FUNDS ARE CLEAN, CLEARED AND OF NON-CRIMINAL ORIGIN, AND ARE FROM LEGAL SOURCE.

INSTRUMENTS: U.S. TREASURY BILLS
TOTAL CONTRACT: USD 10,000,000.00
PRICE: USD 10,000,000
NAME BENEFICIARY : TREATMENT SERVICES OF THE SOUTHWEST CORP.
TOTAL FUNDS : USD 10,000,000.00
TO BE DEPOSITED IN ACCOUNT OF TREATMENT SERVICES OF THE SOUTHWEST CORP.

Appendix E

THE DEPOSIT OF THE AFORE-MENTIONED FUNDS WILL BE IN THE ACCOUNT TREATMENT SERVICES OF THE SOUTHWEST CORP. FOR THE PURCHASE OF THE U.S. TREASURY BILLS. TREASURY BILLS WILL BE ASSIGNED TO THE SENDER OF FUNDS, H.H. TITTUS FROM THE DAY OF PURCHASE. THE ABOVE FUNDS WILL BE PAID TO YOU UNDER THE EXPLICIT CONDITION THAT YOUR BANK CONFIRMS TO US VIA KEY TESTED SWIFT THAT YOU SHALL RETURN TO US THESE FUNDS IN FAVOUR OF THE INVESTOR MR. H.H. TITTUS, UNENCUMBERED AND FREE OF LIENS AT THE END OF ONE YEAR (1 YEAR) AND PAYMENT TO THE INVESTOR H.H. TITTUS WILL BE MADE WITHOUT PROTEST, SET-OFF AND FREE AND CLEAR OF ANY DEDUCATIONS, CHARGES, FEES, WITHHOLDING OF FEES, TAXES, CHARGES OF REASON ASSESSED BY ANY ENTITY AT THE END OF ONE YEAR. THIS SWIFT INSTRUMENT IS VALID FOR TEN INTERNATIONAL BANKING DAYS.

THIS IS AN OPERATION INSTRU-MENT AND IS SUBJECT TO THE

Appendix E

UNIFORM CUSTOMS AND PRACTICES OF THE INTERNATIONAL CHAMBER OF COMMERCE (ICC) PUBLICATIONS UNDER 400 (THE UNIFORM CUSTOMS) AND THE NBW INTERNATIONAL CHAMBER OF COMMERCE PUBLICATION 900 (1992 REVISION)

ACCOUNT OFFICER
HJ. ANDRES

ACCOUNT OFFICER
J. DRESCHER

APPENDIX F — AUGUST 2, 1995 SWIFT (KORR)
FROM TITTUS TO NATIONSBANK

95AUG02 15:47:08 Local Terminal PZH1
MT 8199 Free Format Page 00001
Func ZAPRIN

Basic Header	F 01 BSILCH22A80A 0000 000000
Application Header	I 199 NABKUS44XDAL N
	*NATIONSBANK OF TEXAS, N.A.
	*DALLAS,TX
	*(TEXAS HEAD OFFICE)
User Header	Bank. Priority 113:
	Msg User Ref. 108:
TRN	*20 : ZATG02A2389KORR
Related Reference	21 : .

Narrative *79 : TO NATIONS BANK OF TEXAS, N.A.
BANK OFF. MS. TERRI MUSTIN,
BANK. CENTER MANAGER

WE MAKE REFER TO OUR SWIFT
MT199 DD JULY 31,1995
TRN ZATG31J2388.

WE KINDLY ASK YOU TO AMEND
THE TEXT OF OUR ABOVE MEN-
TIONED MESSAGE AS FOLLOWING:

Appendix F

QUOTE
(I) CORRECT ACCOUNT NUMBER SHOULD BE: 266 40 655 61
(II) DELETE:
VALUE DATE: 48 HOURS AFTER YOUR CALLING
INSERT: WIRE ADVISED SAME DAY VALUE

UNQUOTE

MANY THANKS AND KIND REGARDS

ACCOUNT OFFICER
HJ. ANDRES

ACCOUNT OFFICER
J. DRESCHER

APPENDIX G — AUGUST 4, 1995 SWIFT FROM NATIONSBANK TO TITTUS, AGREEING TO ACCEPT TITTUS' TRANSFER OF $10 MILLION, PURCHASE TREASURY BILLS, AND REGISTER THEM IN TITTUS' NAME

NATIONSBANK TEXAS
ADMINISTRATIVE MESSAGE

INPUT BY TERRI MUSTIN
PHONE NO 7139985710
ORIG BNK CTR NAME PASADENA SOUTH
BK CTR NO 0743
DESTINATION:
BANK NAME BANC DELLA SVIZZERA ITALIANA
BRANCH ADDRESS
CITY/COUNTRY ZURICH SWITZERLAND
TLX NO BSILCH22A80A
SWIFT ADDRESS BLEICHERWEG 37
ZIP
PRINTER LTERM PR743016

TEXT: AT THIS TIME RELATING TO TRANSACTION REFERENCE NUMBER ZATG02A2389KORR, PLEASE BE ADVISED TO TRANSFER FUNDS INTO ACCOUNT OF TREATMENT SERVICES OF THE SOUTHWEST ABA NO 111000025 ACCOUNT NO 2664065561. AMOUNT OF TEN MILLION US DOLLARS FOR PURCHASE OF TREASURIES.

WT3108: TRANSACTION COMPLETED.
TXID: 074308049500617